

①

90-30

Supreme Court, U.S.

F I L E D

JUL 2 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

BERTHA H. WILLIAMS,

Petitioner,

v.

C. WILLIAM VERITY:
Secretary, Department of Commerce,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

Robert L. Bell
617 K Street, N.W.
Washington, D.C. 20001
(202) 842-4066

Attorney for Petitioner



QUESTIONS PRESENTED

Whether it is reversible error for a court to allow untrue statements, articulated by a Defendant to satisfy his intermediate burden of production of some legitimate, non-discriminatory reason for his employment decision, to rebut a prima facie case of employment discrimination under Title VII, 42 U.S.C. Section 2000e et seq., where testimony proffered by a Defendant has been impeached and is not legally sufficient to justify a judgment for the Defendant.

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
DECISIONS BELOW.	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE.	3
REASONS FOR GRANTING THE WRIT.	8
<p>It Is Reversible Error For A Court To Allow Untrue Statements, Articulated By A Defendant To Satisfy His Intermediate Burden Of Production Of Some Legitimate, Non-Discriminatory Reason For His Employment Decision, To Rebut A <u>Prima Facie</u> Case Of Employment Discrimination Under Title VII, 42 U.S.C. Section 2000e <u>et seq.</u>, Where Testimony Proffered By A Defendant Has Been Impeached And Is Not Legally Sufficient To Justify A Judgment For The Defendant.</p>	
CONCLUSION.	27
APPENDIX A.	1a
APPENDIX B.	2a
APPENDIX C.	20a
APPENDIX D.	36a

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Gray v. University of Arkansas</u> <u>at Fayetteville</u>	17
883 F.2d 1394, 1401 (9th Cir. 1989)	
<u>IMPACT v. Firestone</u>	21
893 F.2d 1189, 1195 (11th Cir. 1990)	
<u>McDonnell Douglas Corp. v. Green.</u> .	10
411 U.S. 792, 802 (1973)	
<u>Rowe v. Cleveland Pneumatic</u> <u>Co., Numerical Control.</u>	21
690 F.2d 88, 96 (6th Cir. 1982)	
<u>Texas Dept. of Community Affairs</u> <u>v. Burdine.</u>	passim
450 U.S. 248, 255 (1981)	
<u>Tye v. Polaris Joint Voc. Sch.</u> <u>Dist. Bd. of Educ.</u>	17
811 F.2d 315, 319 (6th Cir. 1987)	
<u>United States Postal Service Board</u> <u>of Governors v. Aikens.</u>	10
460 U.S. 711, 714 (1983)	
<u>MISCELLANEOUS:</u>	
<u>Black's Law Dictionary</u> (4th ed. 1968)	18
<u>UNITED STATES CODES</u>	
28 U.S.C.	2
42 U.S.C.	7

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. _____

BERTHA H. WILLIAMS,
Petitioner,

v.

C. WILLIAM VERITY:
Secretary, Department of Commerce,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

Petitioner, Bertha H. Williams,
respectfully prays that a writ of
certiorari issue to review the judgment
and decision of the United States Court
of Appeals for the Fourth Circuit entered
on March 5, 1990.

DECISIONS BELOW

The decision of the Court of Appeals is not reported. The decision along with the order denying Petitioner's Petition For Rehearing and the decision and Judgment of the District Court are attached as Appendices hereto.

JURISDICTION

The decision of the Court of Appeals was entered on March 5, 1990. A timely petition for rehearing with suggestion that the rehearing be in banc was denied on April 2, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The statute involved is 42 U.S.C. Section 2000e, et seq., as interpreted in Texas Department of Community Affairs v. Burdine, infra.

STATEMENT OF THE CASE

Petitioner, Bertha H. Williams, is a 56 year old black female, who is currently employed as a Computer Systems Programmer (GS-0334-11) by the Bureau of the Census, U.S. Department of Commerce in Suitland, Maryland. (Transcript 40, 87-88, hereafter "Tr.") Petitioner commenced her employment with the Bureau of the Census (hereafter "Census Bureau") in the Peripheral Systems Branch, System Support Division, in September, 1979 at the GS-7 grade level. (Tr. 42). As a Computer Systems Programmer, Petitioner is in a career ladder position in which she can reach the GS-12 grade level without competition. (Tr. 18-19). At the time of Petitioner's initial employment with the Census Bureau, there was a time-in-grade requirement of 12

months for employees in a career ladder position before promotion to the next grade level was to be considered. (Tr. 20-21). In addition to the time-in-grade requirement, the Census Bureau required that an employee receive grade building experience and demonstrate the ability to perform at the next higher grade level before she could be promoted.

Petitioner was supervised in the Peripheral Systems Branch by Ronald Swank, a white male. (Tr. 44). After completing her first year of employment with the Census Bureau in September 1980, Petitioner received an overall evaluation of "satisfactory". Petitioner requested a career ladder promotion from Mr. Swank in September, 1980, but her request was denied. Petitioner was denied promotion to the next highest grade level (GS-9)

because Mr. Swank's asserted explanation that the Census Bureau's promotion policy required 18 months instead of 12 months time-in-grade. (Tr. 20-21, 284-286). Although Petitioner had successfully completed all assignments which she had received from Mr. Swank by October, 1980, he persisted in his refusal to promote her. Mr. Swank eventually promoted Petitioner after she had completed two years in grade as a GS-7. (Tr. 54, 59).

In contrast, Cheryl Marshall, a white female, under the age of 40, was promoted by Mr. Swank within her first three months of employment in the Peripheral Systems Branch. Ms. Marshall started in the Peripheral Systems Branch in June, 1980 as a Computer Systems Programmer at the grade level of GS-9. However, Ms. Marshall was promoted to GS-

11 grade level in August, 1980 after remaining in the GS-9 grade level for only twelve months. (Tr. 376, 386). Mr. Swank promoted Ms. Marshall to the top of her career ladder as a GS-12 after Ms. Marshall had served one year at the GS-11 grade level. (Tr. 386). Yet, Mr. Swank repeatedly maintained to Petitioner that the time-in-grade requirement for a career ladder promotion at the Census Bureau was 18 months and not 12 months. (Tr. 296-297).

Petitioner had met the standards for promotion to the GS-9 grade level in 1980. She met the requirement for time-in-grade and had achieved a satisfactory rating, which she was told would be necessary for promotion to the GS-9 grade level. (Tr. 59). Upon establishing a prima facie case of employment

discrimination under Title VII, 42 U.S.C. Section 2000e et seq., the District Court allowed impeached testimony to be used to rebut Petitioner's prima facie case. Respondent's proffered reasons for denying Petitioner's promotion was that she was not qualified and that she had not demonstrated the ability to perform satisfactorily at higher grade levels. (Tr. 252-254, 259-260).

The United States Court of Appeals for the Fourth Circuit in its unpublished decision of March 5, 1990, likewise allowed Respondent's impeached testimony to be used to rebut Petitioner's prima facie case of employment discrimination, and affirmed the District Court's ruling that Respondent had offered legitimate, non-discriminatory reasons for denying Petitioner's promotion.

Petitioner then filed a petition for rehearing (with the suggestion the rehearing be in banc) in the Court of Appeals; the petition was overruled on April 2, 1990.

Petitioner now files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The present case raises questions of great importance about the quality of evidence a defendant may use to rebut a prima facie case of discrimination in a Title VII action. This Court has held that "an articulation not admitted into evidence will not suffice" to allow a defendant to rebut a prima facie case of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.9 (1981). This holding has allowed an articulation which was not admitted into

evidence nor raised a genuine issue of fact, to be sufficient to rebut the presumption of discrimination established by a plaintiff's prima facie, regardless of the truth or genuineness of such statements. The Court of Appeals has decided that the impeached testimony of a witness for the Defendant is an acceptable form of evidence which the Defendant may use to satisfy his burden of proof. We believe that this decision is incorrect. Furthermore, if permitted to stand, this decision could be expected to damage the essence of the fact-finding process and taint the integrity of our judicial process and system.

Under Texas Department of Community Affairs v. Burdine, 450 U.S. at 254, once the Plaintiff has met his burden in setting forth a prima facie case of

discrimination, the burden shifts to the Defendant to produce evidence that his employment decision was based upon legitimate, non-discriminatory reasons. Accord, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983). The Defendant need only to produce evidence which raises a genuine issue of fact as to whether it discriminated against the Plaintiff; the Defendant need not persuade the court that it was motivated by the proffered reasons. Id. at 254. The Defendant must introduce admissible evidence which 1) clearly sets forth the reason for his employment decision, and 2) the reason(s) must be legally sufficient to justify a judgment for the Defendant. Id. at 255.

In the present case, the United States Court of Appeals for the Fourth Circuit agreed with the District Court's finding that the Defendant offered a legitimate, non-discriminatory reason for the Defendant's treatment of Mrs. Williams. (App. C, infra, p. 30a). The Defendant's proffered reason for denying promotion to Mrs. Williams was her failure to demonstrate the ability to perform satisfactorily at higher levels. The Court of Appeals erroneously adopted the District Court's conclusion that the Defendant had produced evidence to sufficiently rebut the Plaintiff's prima facie case of discrimination based upon the testimony of Robert Swank. Mr. Swank's testimony was supposedly corroborated by the testimony of three other employees, Judith Shoup and Cheryl

Marshall and Robert Lambird. Id. at 6. However, Mrs. Williams was supervised by none of these employees. The District Court use of Marshall, an obviously bias witness who was promoted by Swank after being under his supervision for only three months. In fact, Mr. Swank's promotion of Marshall is clear evidence which corroborates Mrs. Williams' contention that defendant's explanation concerning 18 months in grade is but a pretext to mask illegal discrimination. Further, there is no support in the record for the District Court assertion that Lambird corroborates any testimony given by Mr. Swank. Finally, Shoup did not even work with Mrs. Williams in the Peripheral Systems Branch.

Defendant's proffered reason for denying promotion to Mrs. Williams is

grounded upon a pretextual basis. It presumes that an employee's promotion is conditioned only upon her ability to demonstrate that she can perform satisfactorily at higher levels. However, the District Court refused to credit the presumption created by Plaintiff's prima facie case that she, as was Ms. Marshall, qualified for promotion to the next grade level. In fact, evidence from Mrs. Williams which was admitted at trial demonstrated this fact. In the X-118 qualification standards for a Computer Specialist in the GS-334 Series, which was admitted into evidence at trial, the following statement is instructive on this point.

"The requirements in this standard reflect the fact that proficiency in application of knowledges and skills at a given level indicates probability of success in

similar work at the next higher level."

Mrs. Williams met this standard for promotion after her first year as demonstrated by her satisfactory performance at the GS-7 grade level.

This demonstration of satisfactory performance is important to the granting of a career-ladder promotion, however, it is but one factor. An additional factor is the time-in-grade requirement. It was proven at trial that the minimum requirement for promotion was 12 months in grade. (Tr. 20-21). However, Mr. Swank maintained that the Bureau's promotion policy required 18 months in grade. (Tr. 284-287). The promotion process at the Bureau must be observed in the present case as it is specifically applied to Mrs. Williams and Mrs.

Marshall during the first year that each woman was employed under Mr. Swank. Mr. Swank refused to promote Mrs. Williams from a GS-7 to a GS-9 after her first year of employment solely because he asserted that the necessary time-in-grade was 18 months. Although Mr. Swank testified that he did not believe that Mrs. Williams was capable of satisfactorily performing as a GS-9 until October of 1981, this testimony was impeached, and the District Court erroneously credited the testimony. (App. B, infra, p. 14a). Moreover, Mr. Swank further contradicted his asserted explanation of an employee needing to serve 18 months in grade before receiving promotion by granting a promotion to Cheryl Marshall within the first three months of her employment under him and

within a 12 month period of her last promotion. (Tr. 295-296). Mr. Swank's simple proclamations that Ms. Marshall was qualified for her promotion does not negate the indisputable fact that she did not receive the required annual performance appraisal as did Mrs. Williams. Mr. Swank performed no formal evaluation of Ms. Marshall; she was simply promoted based on oral statements made by Mr. Swank.

Nevertheless, Mrs. Williams was qualified for her promotion from the GS-7 level to the GS-9 level after 12 months as evidenced by her performance ratings. Accordingly, Defendant's basis for denying promotion to Mrs. Williams was manifestly pretext because it allowed the District Court to find, and the Court of Appeals to accept Mr. Swank's unsupported

statement that Plaintiff only had to demonstrate that she could satisfactorily perform at a higher level before she could be promoted. In addition, Defendant's proffered reasons for denying promotion to Mrs. Williams was based on impeached testimony and untrue statements, which should not be credited to sufficiently rebut Plaintiff's prima facie case of discrimination.

It has been held in some Circuits that an employer may meet its burden of production by articulating even an untrue reason for its employment decision. Tye v. Polaris Joint Voc. Sch. Dist. Bd. of Educ., 811 F.2d 315, 319 (6th Cir. 1987, cert. denied, 484 U.S. 924, 108 S.Ct. 285, 98 L.Ed. 2d 246 (1987)); Gray v. University of Arkansas at Fayetteville, 883 F.2d 1394, 1401 (9th Cir. 1989).

While Petitioner has problem with the use of untrue testimony to rebut a prima facie case, the present case is unique because the statements made by Ronald Swank were more than mere untrue statements. Through cross-examination, Plaintiff demonstrated that Ronald Swank lied when he gave his testimony. (Tr. 272, 275-76, 289-90). A lie is "an untruth deliberately told; the uttering or acting of that which is false for the purpose of deceiving; intentional misstatement." Black's Law Dictionary 1071 (4th ed. 1968). "Untrue" is defined as "prima facie inaccurate, but not necessarily wilfully false." Id. at 1708. The similarities between a lie and an untrue statement are easily seen; both are representations of facts not exactly as they exist. Nevertheless, the

difference between the two is inescapable. A lie is an untrue statement which is intentionally told. There must be a fundamental error in concluding that because a lie is an untrue statement and an untrue statement may be used to rebut a prima facie case then a lie may also be used to rebut a prima facie case of discrimination.

Our legal system does not sanction the activity of intentionally misrepresenting the truth and those who engage in such activity cannot do so with impunity. To allow the discredited testimony of Ronald Swank to be used to rebut Plaintiff's prima facie case is to attack the integrity of the judicial process and should not be tolerated.

Moreover, if impeached testimony is allowed to be admitted as an acceptable

form of evidence which the Defendant may use to satisfy his burden of proof, then the Plaintiff would be frustrated in sustaining her subsequent burden to demonstrate pretext. Under Burdine, the Defendant must articulate reasons which are sufficiently clear "so that Plaintiff will have a full and fair opportunity to demonstrate pretext." Burdine, 450 U.S. at 255-56. The United States Court of Appeals for the Eleventh Circuit has questioned the use of circumstantial evidence by a defendant to satisfy the requirement that he articulate a legitimate non-discriminatory reason, thusly:

It is difficult to understand how a claimed articulation by circumstantial evidence could meet the carefully stated requirements of Burdine that the reasons given are to be given "with sufficient clarity so that

the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of defendant's evidence should be evaluated by the extent to which it fulfills these functions." 450 U.S. at 255-56, 101 S.Ct. at 1094.

IMPACT v. Firestone, 893 F.2d 1189, 1195 n.5 (11th Cir. 1990). It is evident that an articulation which is admitted into evidence must be clear before it is sufficient to rebut a prima facie case of discrimination. In addition, an articulation must be substantiated by evidence which is "reasonably specific and legally sufficient." Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88, 96 (6th Cir. 1982).

Petitioner finds that it is equally difficult to understand how impeached testimony which is proffered by the

Defendant to rebut the Plaintiff's prima facie case could meet the requirements of Burdine. Testimony which has been impeached is, by its very nature, unworthy of belief. Impeached testimony cannot be substantiated by legally sufficient evidence because the testimony itself cannot be supported on its own. Burdine explicitly states that "The explanation provided must be legally sufficient to justify a judgment for the defendant." Burdine, 450 U.S. at 255. Accordingly, an explanation which is not legally sufficient cannot be allowed to rebut a prima facie case of discrimination. Impeached testimony is a perfect example of the type of explanation which should not be allowed to rebut plaintiff's prima facie case. Its character of unbelievability clouds

any degree of clarity with which it may have been expressed. It cannot be substantiated because it falls flat upon its inherent lack of merit. This is the whole point of impeachment of a witness at trial.

The standard which an articulation by a defendant must meet, as expressed in Burdine, supra, was confusing to the courts below. The District Court and the Court of Appeals allowed Respondent to meet its burden with impeached testimony. This was not correct. A defendant who relies upon impeached testimony cannot sustain his burden to produce evidence which is clear, reasonably specific and legally sufficient. Burdine, 450 U.S. at 255. If impeached testimony is allowed to rebut a prima facie case of

discrimination, Petitioner's rights to due process and a fair trial are violated by crediting testimony which has been demonstrated to be unworthy of credence.

In Burdine, this Court anticipated and addressed the problem presented by the instant case where a defendant has relied upon an impeached and discredited explanation in an effort to rebut Plaintiff's prima facie case:

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with

effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n.10.

This is such a case. Here, Petitioner initial evidence, combined with cross-examination which impeached and discredited Respondent's explanations that the time in grade requirement was 18 months--rather than 12 months--and that Plaintiff had not demonstrated that she was qualified for a promotion. The evidence at trial clearly demonstrated that defendant promoted a similarly situated white employee--Cheryl Marshall--in a 12 months period and without the benefit of the required written performance appraisal. Petitioner met her burden of persuasion by demonstrating that defendant's explanation was unworthy of credence and by showing that

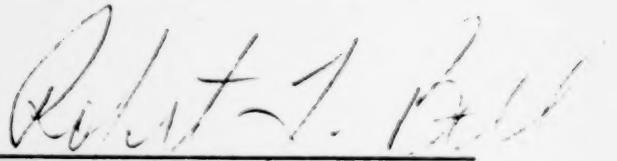
"similarly situated employees were not treated equally." Burdine, 450 U.S. at 258. In this case, career ladder promotions were automatic for a white employee; however, they were arbitrarily denied for the black employee.

In sum, Petitioner met her burden of persuasion but was wrongfully denied judgment in her favor. Because of the importance of the question and the problem that the treatment of untrue evidence presents in the circuits, we believe that an appropriate disposition would be to vacate the judgment of the Court of Appeals and remand the case for reconsideration. On remand before the District Court, the court should be directed to enter judgment for Petitioner.

CONCLUSION

The Petition for Writ of Certiorari
should be GRANTED.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert L. Bell", written over a horizontal line.

Robert L. Bell
617 K Street, N.W.
Washington, D.C. 20001
(202) 842-4066

Attorney for Petitioner


CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed by first class mail, postage prepaid, this 2nd day of July, 1990 to:

Susan Ringler, Assistant
United States Attorney
820 U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692

and one copy to:

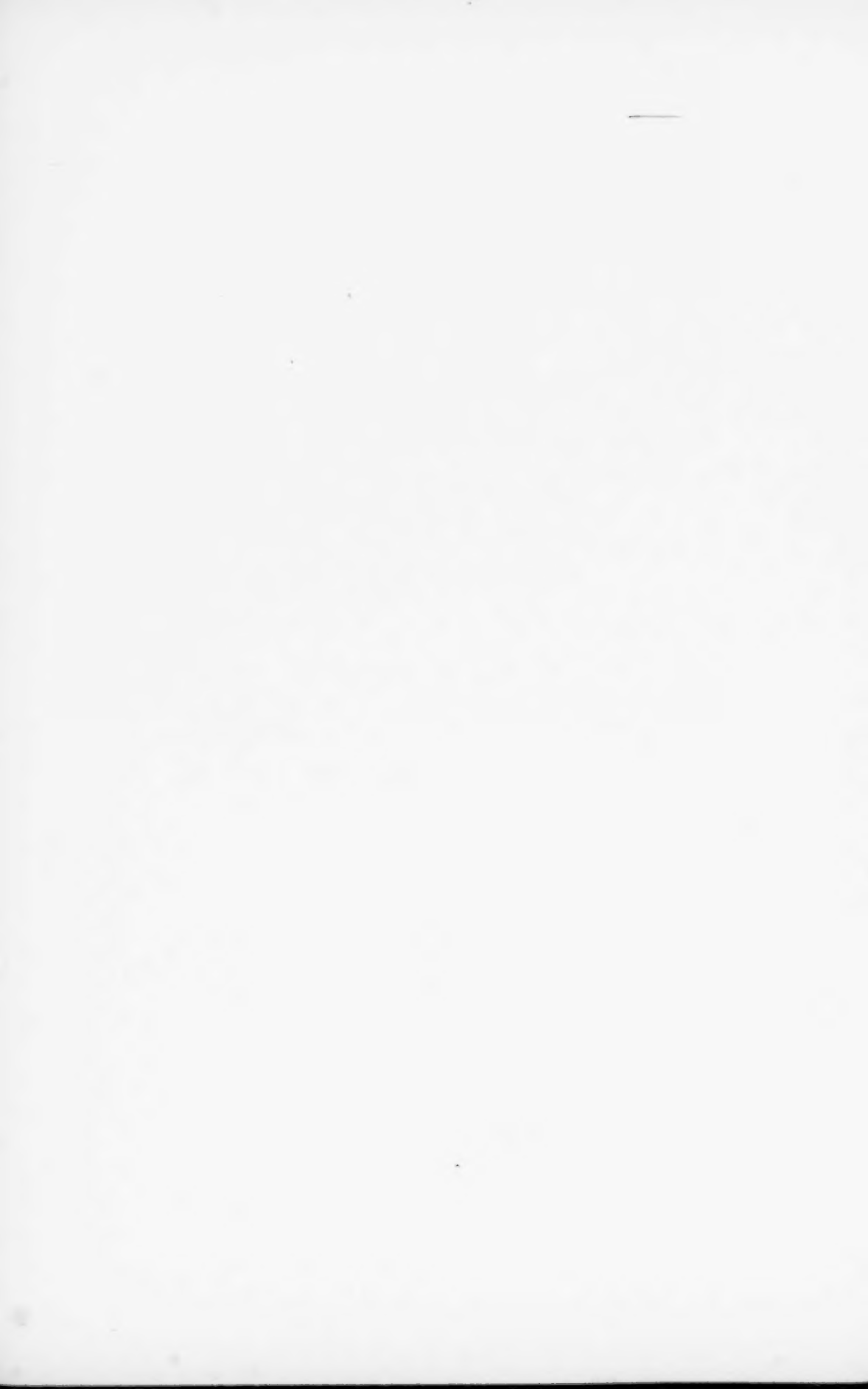
Clinton S. Janes, III, Esquire
Office of General Counsel
U.S. Department of Commerce
14th & Constitution Avenue, N.W.
Room 5882
Washington, D.C. 20230



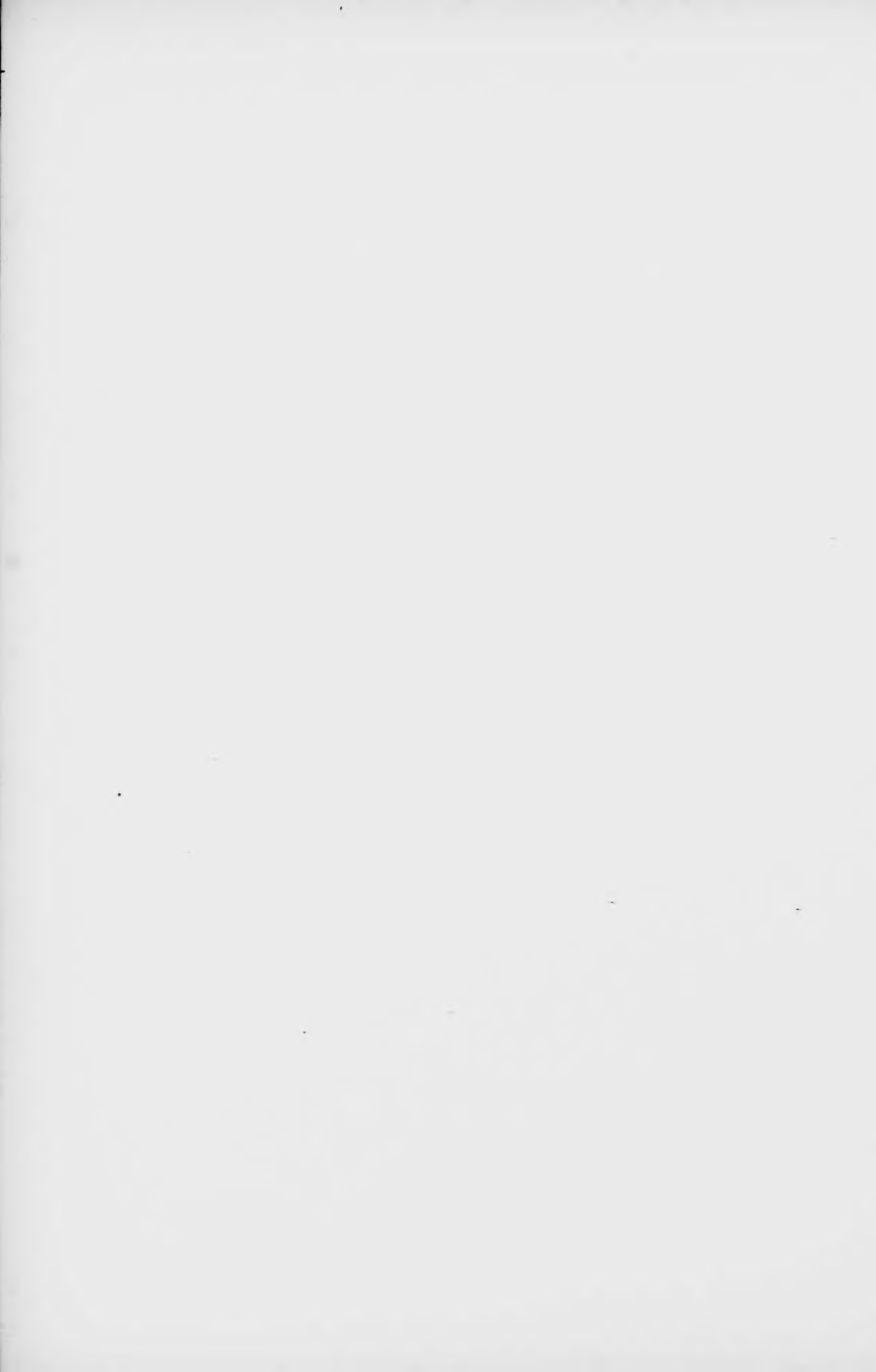
Robert L. Bell

Attorney for Petitioner

A P P E N D I C E S



APPENDIX B



APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERTHA H. WILLIAMS :
:
Plaintiff, :
:
v. : Civil No. PN 87-1585
:
C. WILLIAM VERITY, :
Secretary, Depart- :
ment Commerce :
:
Defendant.:

I. BACKGROUND

Plaintiff Bertha H. Williams, a 54-year-old black female, brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. [Section] 2000e et seq., and under the Age Discrimination in Employment Act of 1967, 29 U.S.C. [Section] 621 et seq., alleging that she was discriminated against on the basis of her race, sex and age. The defendant is plaintiff's employer, C. William Verity, sued in his capacity as the Secretary of

the Department of Commerce.

In 1971, Plaintiff began an Upward Mobility Program at the University of the District of Columbia. The program consisted of a basic college curriculum and included courses dealing with computers. Plaintiff completed the program and received a BBA in Computer Information Systems in 1978.

In September of 1979, Plaintiff was hired by the Peripheral Systems Branch of the Systems Support Division of the Bureau of the Census to work as a Programmer/Analyst. Plaintiff began work at the Bureau as a grade 7. The position was a career ladder position which allowed three promotions (up to GS-12) without regard to competition. Employees were eligible for promotion after twelve months in grade. Promotion, however, was not automatic. It was only given if the

employee had performed satisfactorily for twelve months at his or her GS level and showed potential to perform satisfactorily at the next higher grade level.

In January of 1981 Plaintiff requested a promotion from grade 7 to grade 9. Plaintiff's supervisor, Ronald R. Swank, denied her request at that time. Plaintiff eventually received a promotion to a GS-9 in October of 1981.

Plaintiff has not received a promotion since October of 1981. She currently works as a GS-9 programmer/analyst. She brought this action on June 17, 1987, alleging that she was denied timely promotion and ordered to retake classes she had previously taken because of race, sex, and age discrimination, and in retaliation for filing discrimination

complaints against her supervisor.

Plaintiff seeks retroactive promotion to GS-9 as of September 1980, to GS-11 as of September 1981, to GS-12 as of September 1982, and backpay to cover the above period. She also seeks reimbursement for attorney's fees and costs.

II. THE APPLICABLE LAW

Plaintiff has brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. [Section] 2000e et seq., and under the Age Discrimination in Employment Act of 1967, 29 U.S.C. [Section] 621 et seq., alleging discrimination on the basis of race, sex, and age. In these actions, plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. See, e.g.,

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-4 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If a prima facie case is established, the burden shifts to the defendant to demonstrate that it had a legitimate, nondiscriminatory reason for the challenged action. Burdine, 450 U.S. at 253-255. The burden then shifts back to the plaintiff to demonstrate that the reasons proffered by the defendant were not the real reasons for the challenged action, but were a pretext to mask discrimination. Id. The ultimate burden of persuasion that there was discrimination against the plaintiff remains at all times with the plaintiff. Burdine, 450 U.S. at 253.

In McDonnell Douglas, supra, the Supreme Court described what is required

to establish a prima facie case of racial discrimination. That case requires a plaintiff alleging racial discrimination in hiring to show:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802 (footnote omitted).

The Supreme Court recognized that the above standard would not be applicable in every fact situation and would have to be adapted to fit the specific facts involved in each case. See McDonnell Douglas at 802, n.13; E.E.O.C. v. Western Elec. Co., Inc., 713 F.2d 1011, 1014-15 (4th Cir. 1983) (adapting the McDonnell[sic] Douglas

standard to apply in an age discrimination case). In this case plaintiff can establish a prima facie case of race, sex, and/or age discrimination by showing (1) that she is a black female over the age of forty; (2) that she was qualified for career ladder promotions in 1980, 1981, and 1982; (3) that despite her qualifications, she was denied these promotions; and (4) at the same time plaintiff was denied promotion, other persons of similar qualifications were promoted.

In Burdine, supra, the Supreme Court described the standard defendant must meet to rebut the presumption created by the prima facie case, and the burden placed upon plaintiff if defendant does rebut the presumption:

The burden that shifts to the defendant . . . is to rebut the

presumption of discrimination by producing evidence that plaintiff was [denied a promotion] for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate

that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, supra at 254-256 (footnotes and citations omitted).

In addition to alleging race, sex and age discrimination, plaintiff alleges that she was denied promotion in retaliation for filing discrimination complaints against her supervisor. Such conduct would violate 42 U.S.C. [Section] 2000e-3(a), which states, in relevant part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this

subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

To prove a prima facie case of retaliation, the plaintiff must show: (1) that the plaintiff engaged in protected activity (filing the complaint), (2) that the plaintiff was subjected to an adverse employment decision (she was not promoted), and (3) that there is a causal connection between (1) and (2). See, e.g., McKenna v. Weinberger, 729 F.2d 783, 791 (D.C. Cir. 1984). If a plaintiff proves retaliation by direct evidence, the employer must then prove by a preponderance of the evidence that the employment decision would have been made absent the retaliatory factor. If the plaintiff does not prove retaliation by direct

evidence, he may establish a prima facie case under McDonnell[sic] Douglas, at which time the employer must articulate a valid, nondiscriminatory reason for its employment decision. See, e.g., Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).

III. APPLICATION OF THE LAW TO THE FACTS

During the case-in-chief, Plaintiff met her burden of establishing a prima facie case of race, sex, and age discrimination. She also established a prima facie case of illegal retaliation. Defendant, however, offered a legitimate, nondiscriminatory reason for plaintiff's treatment. Defendant offered evidence that plaintiff was not promoted after meeting the time in grade requirement because she was not otherwise qualified for promotion. Because defendant has

offered a legitimate, nondiscriminatory reason for the alleged unlawful conduct, and because plaintiff has failed to show by a preponderance of the evidence that this reason is a pretext to mask discrimination, this court will rule that plaintiff is not entitled to recovery.

Evidence presented at trial showed that plaintiff's position allowed for 3 promotions to a GS-12 without regard to competition. Bureau policy made employees eligible for promotion at completion of 12 months in grade, but an employee was only promoted if his work was such that there was a clear indication that he could perform satisfactorily at the next higher level and eventually reach the full career level (in this case GS-12). It was not Bureau policy to promote everyone who had

completed 12 months in grade satisfactorily.

Ronald Swank, who was responsible for evaluating plaintiff's performance, testified at trial that he did not recommend plaintiff's promotion to a GS-9 until October of 1981 because until that time he did not believe she was qualified to perform satisfactorily at that level. He did not thereafter recommend her promotion to a higher level because, again, he did not believe she could perform satisfactorily at a higher level.

Swank's testimony is corroborated by his written evaluation of plaintiff's performance and by the testimony of other employees at the Bureau. Swank's first two evaluations of plaintiff's work, covering the period from when she was hired through May of 1981, rated her

performance as satisfactory. These evaluations noted that plaintiff needed to develop a more aggressive attitude in problem solving and user support. In June of 1982 Plaintiff received a mid-year evaluation which indicated that she was performing at a minimal level of satisfaction. On her 1983 mid-year performance review, Plaintiff received a rating of unsatisfactory.

At this point, in what he described as an effort to remedy Plaintiff's performance problems, Swank assigned Plaintiff to retake several of the computer classes she had taken as a recruit. He asked Judith Shoup, a computer instructor with the Bureau who trained recruits, to develop a program of study which would fill in the gaps in plaintiff's knowledge. During this

retraining, Shoup spent at least sixty hours outside of class tutoring the plaintiff one-on-one. Shoup testified that plaintiff "couldn't grasp basic logic concepts" and that her performance was not what she would expect from a GS-9, plaintiff's grade level at the time.

On October 25, 1983, Plaintiff received an unsatisfactory rating on her annual general work force performance evaluation, which covered the period from 10/1/82 to 9/30/83.

Further corroboration of Swank's testimony came from Shirley [sic] Marshall, another programmer in the Peripheral Systems Branch, who testified that plaintiff worked very slowly and that Marshall was often asked to complete assignments that plaintiff had failed to complete.

The testimony of Robert Lambird, chief of the Technical Services Division and volunteer EEO representative at the Bureau since 1971, also supports Swank's testimony. In 1981 plaintiff approached Lambird to discuss her failure to receive a promotion. Lambird testified that he examined plaintiff's pending and completed projects in response to plaintiff's complaint and that he did not think plaintiff was performing at the level of a GS-11. This disputes plaintiff's contention that as of 1981 she was qualified for but denied promotion to a GS-11.

With this evidence, defendant has met its burden of establishing a legitimate, nondiscriminatory reason for not promoting plaintiff and for requiring her to retake certain training courses.

Plaintiff did not offer additional evidence at the close of defendant's case, but relied on the evidence presented during the case-in-chief and during the cross-examination of defendant's witnesses to attempt to demonstrate pretext. The Court was not persuaded by a preponderance of the evidence that defendant's reason was a mere pretext to mask discrimination. Rather, the Court concludes that Plaintiff was not promoted because of her failure to demonstrate the ability to perform satisfactorily at higher levels, and that race, sex, and age discrimination was not a factor in the decision not to promote. Similarly, the Court concludes that plaintiff was required to retake certain training courses because her performance indicated

that she needed the retraining, and not because of discrimination of any sort. Finding no discrimination, this Court enters judgment for the defendant.

/s/

United States District Judge

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 89-1736

BERTHA H. WILLIAMS

Plaintiff - Appellant

versus

C. WILLIAM VERITY, Secretary,
Department of Commerce

Defendant - Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Paul V. Niemeyer, District Judge. (C/A No. 87-1585-PN)

Argued: Jan. 9, 1990 Decided: March 5, 1990

Before ERVIN, Chief Judge, BUTZNER, Senior Circuit Judge, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Robert L. Bell for Appellant. Clinton S. Janes, III, Office of General Counsel, UNITED STATES DEPARTMENT OF COMMERCE (Breckingridge L. Wilcox, United States Attorney; Susan M. Ringler, Assistant United States Attorney, on brief) for Appellee.

HILTON, District Judge:

This appeal arises out of an employment discrimination case brought under Title VII, 42 U.S.C. [Section] 2000e et seq., and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. [Section] 621 et seq. After a two-day bench trial the district court entered judgment in favor of the defendant. We affirm.

I.

Appellant Bertha Williams is a 56-year-old black female. In September 1979, Ronald Swank, a white male, hired Williams as a programmer/analyst, GS-7, in the Peripheral Systems Branch of the Bureau of the Census ("Bureau"). As a Computer Systems Programmer, Williams was in a career ladder position that allowed three promotions up to GS-12

without competition. Such promotions, however, were not automatic or guaranteed. Before Williams could be promoted, she had to spend at least one year working at her present grade and demonstrate the capability of performing successfully at the next higher level.

In September 1980, after one year in the GS-7 position, Williams requested a promotion to GS-9. Swank, plaintiff's branch chief at the time, denied the request, apparently under the impression that the Bureau required 18 months in one grade before promotion. After Williams had completed 18 months, she again asked for promotion. Swank denied the request at that time because he did not feel Williams was ready to perform GS-9 duties. Swank eventually

approved a GS-9 promotion for Williams in September 1981.

Before Williams was promoted, Cheryl Marshall, a younger white female, was hired by Swank to work in the Peripheral Systems Branch. Marshall began as a GS-9 but was promoted to GS-11 within three months of her arrival. At trial, Swank testified that Marshall was promoted because she already had nine in-grade months as a GS-9 and her performance rating was "outstanding." Marshall was promoted to a GS-12 the following year after receiving another "outstanding" rating. Although Williams suggested that Swank "developed a relationship with Ms. Marshall," the claim was not supported by the evidence.

Williams had not received a

promotion since her 1981 promotion to GS-9. In August 1982, after receiving a performance rating of "satisfactory" and being refused advancement to GS-11, Williams filed a formal age discrimination claim. In April 1983, Williams received an "unsatisfactory" rating. Around that time Swank asked Williams to retake several computer training classes. Despite participating in a specially tailored review program, Williams continued to have difficulty performing given assignments. In October 1984 Williams received another "unsatisfactory" rating.

Williams claims that her troubles at work during this time were the result of unreasonably difficult assignments given in retaliation for her filing of the age discrimination

claim. On June 22, 1987, Williams filed a Title VII claim with the district court. Naming her employer, the Secretary of Commerce, as the defendant, Williams alleged that she was denied advancement because of her race, sex, and age, and that she was made to retake computer classes in retaliation for her filing of the EEOC complaint. Williams sought retroactive promotion to GS-9 as of September 1980, to GS-11 as of September 1981, to GS-12 as of September 1982, and backpay to cover the above period.

On January 9-10, 1989, a bench trial was held on Williams' claims. After hearing all the evidence presented, the district court found that Williams had established a prima facie case of race, sex, and age

discrimination as well as a prima facie case of illegal retaliation. However, the district court held that Williams was not entitled to recovery because the defendant offered a legitimate, non-discriminatory reason for the alleged unlawful conduct, and plaintiff failed to show by a preponderance of the evidence that defendant's reason was a pretext to mask discrimination.

II

Appellant's first claim on appeal is that the district court erred in its conclusion that the defendant properly rebutted plaintiff's prima facie case. Appellant raises no error law but challenges the district court's factual findings. The court's findings of fact can only be set aside

when they are clearly erroneous. Fed. R. Civ. P. 52(a). See Holder v. City of Raleigh, 867 F.2d 823, 828-29 (4th Cir. 1989). Finding more than enough evidence to support the district court's factual determination, we reject appellant's claim.

Once plaintiff met her burden in setting forth a prima facie case of discrimination and retaliation, the burden shifted to the defendant to produce evidence that plaintiff was refused promotion for legitimate, non-discriminatory reasons. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Because this burden was one of production and not persuasion, the defendant had only to produce evidence which would allow the trier of fact rationally to conclude that the

promotion decision had not been motivated by discriminatory animus. Id. at 257. The defendant did not have to demonstrate it was actually motivated by the proffered reasons; rather, it was enough if the defendant's evidence raised a genuine issue of fact as to whether it discriminated against the plaintiff. Id. at 154-55.*

*This standard also applies to the retaliation claim. Once a prima facie retaliation claim is made, the employer need only show a legitimate non-discriminatory reason for the adverse action. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). The employer is not required to prove the absence of a retaliatory motive, but only to raise a "genuine issue of fact" as to whether retaliation for protected activity occurred. Burdine, 450 U.S. at 254; Ross, 759 F.2d at 365.

In this case there was ample evidence to support the district court's finding that the defendant offered a legitimate, non-discriminatory reason for the plaintiff's treatment. Swank testified that Williams was denied promotion because of her failure to demonstrate the ability to perform satisfactorily at higher levels. In support of this, Swank pointed out that he had received complaints from users of the system that Williams had been trained on that Williams "wasn't able to respond to the questions that she should be able to respond to." Swank also testified that Williams "had problems completing her work on time" and "couldn't analyze problems properly." These evaluations were

corroborated by two other employees. In addition, a co-worker of Williams testified that Swank treated all employees in his branch fairly, including females and blacks.

- The district court also properly found that the defendant had rebutted plaintiff's prima facie case of retaliation. Williams alleged that her assignment to retake entry level computer classes was done in retaliation for filing the discrimination claim. The evidence presented at trial, however, suggested that Swank assigned the instruction to help Williams improve her skills. This conclusion was corroborated by testimony from another witness and certainly raised at least a "genuine issue of fact" as to the absence of a

retaliatory motive.

Appellant contends that the defendant's witnesses supporting the court's findings were "not worthy of credence." However, when findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). Nothing in the record in this case indicates that the testimony of defendant's witnesses were unworthy of belief.

III.

Appellant's second contention on appeal is that the district court erred in concluding that plaintiff failed to demonstrate pretext. Again,

appellant cites no error of law but challenges the district court's factual findings. As with appellant's first claim, there is nothing in the record that would warrant finding the district court's decision clearly erroneous.

Once a defendant successfully rebuts the plaintiff's prima facie case, plaintiff has the burden of demonstrating by a preponderance of the evidence that the defendant's proffered reason for the promotion decision was merely "a pretext" to mask discrimination. Burdine, 450 U.S. at 255 n.10; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1972). Plaintiff can meet this burden by directly persuading the court that a discriminatory reason

more likely motivated the employer or by indirectly showing that the employer's proffered explanation is unworthy of credence. Id. It appears that appellant, in not offering rebuttal evidence at the conclusion of the defendant's case, chose to pursue the latter course.

Indeed, there are times when the plaintiff's initial evidence, combined with effective cross-examination of the defendant, is, in itself, enough to discredit the defendant's explanation. See Burdine, 450 U.S. at 255 n.10. This, however, was not such a case. Defendant's witnesses presented corroborated and persuasive evidence that Williams' lack of advancement was due not to her race, age, or sex, but rather to her

less than satisfactory performance. The district court considered the plaintiff's attempt to demonstrate pretext through cross-examination of the defendant's witnesses but was not persuaded by a preponderance of the evidence that the defendant's reason was a mere pretext to mask discrimination. As already pointed out, insofar as appellant challenges witness credibility, Rule 52(a) and relevant case law impose a substantial burden on the plaintiff to demonstrate that credibility has been misjudged. When a trial judge bases a finding on the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not

internally inconsistent, can virtually never be clear error. Anderson, 470 U.S. at 575.

IV

In short, there is simply no evidence in the record, nor is there an allegation on appeal, that would allow this court to find the district court's factual findings clearly erroneous. Accordingly, the decision of the district court is hereby

AFFIRMED.

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1736

BERTHA H. WILLIAMS

Plaintiff - Appellant

v.

C. WILLIAM VERITY, SECRETARY,
DEPARTMENT OF COMMERCE

Defendant - Appellee

O R D E R

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Butzner and Judge Hilton.

FOR THE COURT

/s/ John M. Greacen
CLERK

